

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE



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| In re: |) | PACA Docket No. D-97-0013 |
| |) | |
| Produce Distributors, Inc., |) | |
| and Irene T. Russo d/b/a |) | |
| Jay Brokers, |) | |
| |) | |
| Respondents |) | Decision and Order |

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; the "PACA"), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.130 *et seq.*; the "Rules of Practice").

This proceeding was instituted by a Complaint filed on January 3, 1997, by the United States Department of Agriculture ("USDA" or "Complainant"). The Complaint alleges that Respondents, Produce Distributors, Inc. ("PDI") and Irene T. Russo, doing business as Jay Brokers, pursuant to a verbal joint venture agreement, made false and misleading statements for a fraudulent purpose by failing to truly and accurately account to 16 consignors for the net proceeds resulting from the sale of their produce in the amount of \$43,242.58 in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Complaint also alleges that Respondents altered federal inspection certificates, thereby making false and misleading statements for the purpose of failing to truly and accurately account to consignors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I presided over a hearing on January 27-30, March 4-5, and April 15, 1998 in New York City. Complainant was represented by Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Produce Distributors, Inc., was represented by David L. Durkin, Olsson, Frank & Weeda, Washington, D.C. Irene Russo was represented by Lawrence Omansky and Dan Cherner, New York, New York.

Complainant introduced numerous exhibits into evidence at the hearing. Neither Respondent introduced any exhibits into evidence. Complainant's exhibits are referred to as "CX"; the hearing transcript for April 15, 1998, is referred to as "2 Tr."; and the remainder of the hearing transcript is referred to as "Tr."

Complainant and Respondent Irene Russo filed post-hearing briefs, proposed findings of fact, proposed conclusions of law and reply briefs. All proposed findings of fact, conclusions of law, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the record.

Findings of Fact

1. Respondent, Produce Distributors, Inc. ("PDI") is a corporation organized and existing under the laws of the state of New Jersey. Its address is 600 South Livingston Avenue, Suite 102, Livingston, New Jersey 07039 (CX 1, 3).
2. At all times relevant, PDI was licensed under the provisions of the PACA, holding license number 771923. This license was renewed annually and was last subject to renewal on or before September 15, 1998 (CX 1).
3. Respondent Irene Russo is an individual, doing business as Jay Brokers, whose address is 81 Edgewood Drive, Orangeburg, New York 10962 (CX 4).

4. At all times relevant, Jay Brokers was licensed under the PACA, holding license number 891361. This license was renewed annually and was subject to renewal on or before June 8, 1998 (CX 2).

5. In May 1995, USDA initiated an investigation of PDI based on four reparation complaints made against PDI. USDA dispatched Robert Rucker, a senior marketing specialist, to examine the records of PDI and Jay Brokers. Ms. Rucker first visited PDI's office on May 24, 1995 (Tr. 29). She subsequently visited Jay Brokers' office. Ms. Rucker examined and photocopied documents and interviewed individuals.

5A. In June 1995, USDA expanded its investigation to a longer time period and to include Jay Brokers. USDA did not notify PDI or Irene Russo in writing that the investigation had been expanded and would include Irene Russo.

6. Ms. Rucker found irregularities in documents in Jay Brokers' files on some joint venture transactions such as files in which there were two accounts of sales with the gross proceeds, net proceeds and deductions differing; files that contained blank photocopies of customers' letterheads; and files that contained copies of accounts of sales on thermal paper with changes made in ink (Tr. 44).

7. PDI's records indicated that records were often falsified by Joe Russo and/or Irene Russo to mislead shippers as to the amounts of profits involved in transactions and that inspection reports were often falsified by Joe Russo and/or Irene Russo.

8. PDI's president, Thomas Gangemi, Jr., told Ms. Rucker that PDI was involved in a joint venture arrangement with Joe Russo in which PDI would assume 60% of any profit or loss and Jay Brokers would assume 40% of any profit or loss (Tr. 30; 2 Tr. 6).

9. PDI's records showed that PDI's profits in the transactions at issue were apportioned 60% to PDI and 40% to Jay Brokers (Tr. 35; e.g., CX 16, p. 46; CX 18, p. 28; CX 20, p. 22; CX 33, p. 39; CX 36, p. 79; CX 38, p. 48; and CX 41, p. 40).

10. The records with respect to the transactions at issue contained numerous memoranda from Irene Russo to the shippers or customers proposing modifications of prices, and records of other communications between Irene Russo and the shippers and customers.

11. The records with respect to the transactions at issue also contained numerous memoranda signed by Irene Russo and faxed from Jay Brokers' fax number that instructed PDI as to fraudulent amounts to remit to shippers and amounts to bill customers in the produce transactions at issue (Tr. 37-40).

12. Based upon the evidence that Irene Russo actively participated in these transactions and that Jay Brokers received 40% of PDI's profits for the transactions at issue, I find that PDI and Irene Russo, doing business as Jay Brokers, were involved in a joint venture in the transactions at issue.

13. Although Joe Russo was listed in PDI's records as an employee, this was a subterfuge. In fact, Joe Russo, together with his wife, Irene Russo, was involved in the joint venture with PDI and he was listed falsely as an employee in PDI's records for his personal convenience.

14. Based upon the evidence, I find that PDI and Irene Russo made false and misleading statements to the consignors in the transactions at issue in order to gain profits in connection with their joint venture.

Conclusions of Law

1. Respondents Irene Russo, doing business as Jay Brokers, and Produce Distributors, Inc., acting as dealers and/or commission merchants, violated section 2(4) of the PACA by making false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis.

2. Respondents Irene Russo, doing business as Jay Brokers, and Produce Distributors, Inc., were involved in a joint venture in connection with these violations in which profits resulting from these joint venture transactions were shared 60% to PDI and 40% to Irene Russo.

I. The False and Misleading Statements

In a "Notice" filed on June 16, 1998, Respondent PDI appeared to admit the alleged violation. That Notice stated in applicable part, "... on the last day of testimony in the above-captioned matter, Thomas Gangemi, Jr., the President and sole employee of Respondent, admitted that Respondent was liable for the acts and omissions of Joe Russo, a former agent of Respondent. All of the transactions detailed in the complaint in this matter involved Joe Russo." The Notice also stated that PDI had already surrendered its PACA license and would not file a brief.

Some of Mr. Gangemi's testimony to which the Notice may have referred includes, "... my opinion is that Joe Russo is the worst scourge on the produce industry and has victimized both Jay Brokers and Thomas Gangemi and Produce Distributors" (2 Tr. 24) and "I surrendered my license in contrition on March 1 and I say I've been victimized by Joe Russo, but it was my error -- in judgment in bringing him into my organization ..." (2 Tr. 31).

After Mr. Gangemi made that statement, I stated, "Let me say that I appreciate your accepting responsibility for these actions, even though you've testified that, directly, you were not involved,

but you accept responsibility for the actions of your agent and employee. I think that's very commendable on your part." Mr. Gangemi replied, "Well, I can't avoid it. Legally, I'm responsible. He's my employee" (2 Tr. 31).

PDI presented no defense with respect to either issue. However, Irene Russo denied that the alleged violations took place and denied that she was involved in a joint venture with PDI in connection with the alleged violations. Virtually all of Respondents' evidence was presented by Irene Russo.

Included in Complainant's evidence were 41 exhibits, each containing documents with regard to one of the 41 transactions at issue (CX 16-39, 41-56, 58). Complainant's investigator, Roberta Rucker, marked on the reverse side of each document from whose office the document was obtained. In the interest of avoiding redundancy, Complainant presented detailed testimony by Ms. Rucker and other witnesses regarding the documents in six prototype transactions (CX 16, 28, 33, 36, 38, 41) and Complainant represented that the violations in the other 35 transactions were similar to those in one or more of the prototype transactions (Tr. 110). Respondents presented no evidence to dispute Complainant's contention that the other 35 transactions contained conduct similar to that in one or more of the six prototype transactions and my examination of the exhibits in connection with the 35 other transactions supports the conclusion that Respondents' improper conduct was similar in those 35 other transactions.

Joe Russo represented PDI in all of these transactions. Joe Russo is married to Irene Russo. Irene Russo operated a produce business under the name of "Jay Brokers" from an office in her home. Joe Russo worked on the PDI transactions at issue from this home office. Irene Russo also assisted Joe in his work in these transactions and Irene participated in these transactions. Forty

percent of the profits from these transactions was paid by PDI to Jay Brokers, after deducting from the 40% salaries and employer expenses in connection with listing Joe Russo in PDI's records as a PDI employee.

In all of the 41 transactions, PDI, represented by Joe Russo, sold produce on a consignment basis on behalf of consignors or suppliers. Thus, PDI acted in a fiduciary relationship as agent for the consignors. Based upon falsified documents that originated from the Russo office and based upon memoranda, faxes, and telephone calls from the Russo's, the consignors were led to believe that less money was received for the produce than was actually received and, based upon these falsified documents and representations, the consignors agreed to accept less money than PDI actually received. The differences between the amounts of money that PDI actually received and the smaller amounts of money that were misrepresented to the consignors as having been received were considered to be profits by PDI and these "profits" were divided 60% to PDI and 40% to Jay Brokers.

The six prototype transactions are as follows:

1. The Isaak Brothers Transaction (CX 16)

This transaction involved 1,716 cartons of peaches sold by PDI for Isaak Brothers on June 24, 1993. The produce was resold by PDI to BT Produce. Jay Brokers submitted a copy of an account of sales to Isaak Brothers from BT Produce on July 30, 1993, that showed that only 33 of the 1,716 cartons were sold and that the other 1,683 cartons were dumped (Tr. 112; CX 16, p. 15). The gross proceeds for the sale were reported as being \$352 and the cost was shown to exceed the proceeds for a loss of \$13,629. On September 20, 1993, Jay Brokers faxed a memo signed by "Irene" to Lee Isaak requesting that the file be closed at "zero billing" and "zero return," based upon

the information provided in the account of sales forwarded to Isaak Brothers by Jay Brokers. Based upon this representation, Lee Isaak agreed (Tr. 111; CX 16, p. 7).

The documents in BT Produce's records indicated that PDI invoiced BT Produce for \$9,106 for the produce, an amount that was subsequently reduced to \$5,674 (CX 16, p. 25). Isaak Brothers was not paid any of this money. The \$5,674 was apportioned between PDI and Jay Brokers on a 60/40 basis (Tr. 116-17, 122; CX 16, p. 46). There was a notation on PDI's jacket file next to "JB" and "Produce" of "J/V" which Karyn Hertzberg, PDI's bookkeeper, explained represented payments under a joint venture agreement (Tr. 117; CX 16, p. 46). PDI's records indicated that Jay Brokers was paid \$2,269.60 (40%) and PDI was paid \$3,404.40 (60%) of the \$5,674.

Lee Isaak testified at the hearing that his decision to authorize closing the file with no proceeds returned to Isaak Brothers was based upon representations made to him by Irene and Joe Russo that there were negative net proceeds from the sale of the produce and that more than 95% of the produce was dumped. Mr. Isaak stated that he was unaware that BT Produce paid Respondent \$5,764 for the same produce (Tr. 634-38).

2. The Sun Pacific Transaction (CX 28)

This transaction involves the sale of grapes by PDI for Sun Pacific on September 22, 1994, for a contract price of \$12,841.50 (CX 28, p. 8). The produce was resold by PDI to L&P Fruit and was inspected upon arrival. PDI invoiced L&P at \$6,632.90 for the produce (Tr. 140-41; CX 28, p. 18). Jay Brokers' records included a copy of another account of sales on L&P's letterhead reflecting net proceeds of \$3,432 (Tr. 144-45; CX 28, p. 26). In response to a memo signed by "Irene" to Sun Pacific requesting authorization to accept a reduced price for the produce, Sun Pacific agreed (Tr. 137-38; CX 28, pp. 2, 23, 26).

PDI's file jacket shows that PDI received \$6,632.90 from L&P Fruit but remitted \$3,173.50 to Sun Pacific and allocated the difference between these amounts of \$3,459.40 between "JB" and "Produce" as profit on a 60-40 basis (CX 28, p. 28).

3. The John Simon Produce Transaction (CX 33)

John Simon Produce sold 2,100 watermelons through PDI at the original delivered contract price of \$5,510.75 on May 12, 1994 (CX 33, pp. 3, 20). The produce was sold to Frankie Boy Produce. John Simon Produce received a typewritten account of sales from Frankie Boy Produce indicating gross proceeds of \$1,864.74 minus a deduction for "COMM. & Repack" of \$511.66, resulting in a net proceeds of \$1,353.08 (CX 33, p. 13). John Simon issued an adjusted invoice for \$1,353.08 (CX 33, pp. 20-22). Jay Brokers' records contains a copy of the adjusted invoice for \$1,353.08. However, their copy of the adjusted invoice contains a note from "Irene" instructing that Frankie Boy be billed \$1,864.74 (CX 33, p. 30) and Frankie Boy paid PDI \$1,864.74 (Tr. 159; CX 33, p. 25). Ms. Rucker found a blank copy of Frankie Boy's letterhead with the same fax imprint contained in the typewritten account of sales found in Jay Brokers' records for this transaction (CX 33, p. 37, 38; Tr. 160-62). It appears that Frankie Boy's account was copied on the blank letterhead and used to create the false typewritten account of sales that was submitted to John Simon (Tr. 162). Thus, the false account represented to John Simon that PDI received \$1,353.08, whereas PDI actually received \$1,864.74. The \$511.66 was split between "JB" and "Produce" on a 60-40 basis (Tr. 163-64; CX 33, pp. 39, 41, 42). The amount of \$204.66 which corresponds to 40% of the \$511.66 is the same amount reflected on PDI's invoice number 263900 and check number 1453 which PDI issued to Jay Brokers on August 17, 1994 (Tr. 165-68; CX 33, p. 44).

Terri Llorente, a representative of John Simon, who negotiated the transaction, testified that Joe Russo told her that there was a charge to commission and repack the watermelons (Tr. 472). Ms. Llorente stated that she would have expected that Frankie Boy Produce might have charged commission and repack charges, however, she was unaware that PDI and Jay Brokers divided the money that they falsely represented were commission and repack charges (Tr. 493-94, 498; CX 33, p. 39).

4. The Sun World Transaction (CX 36)

On July 15, 1994, Sun World sold 2,979 cartons of grapefruit through PDI for an original contract price of \$13,518.37 (CX 36, p.1-2). PDI resold the fruit to L&P and the produce was inspected upon arrival. Sun World received a faxed copy of an account of sales for the produce reflecting gross proceeds of \$13,768, deductions of \$11,698.55, and net proceeds of \$2,069.45 (Tr. 172, 521; CX 36, pp. 11-12). Based upon PDI's representations that these were the net proceeds from the sale, Sun World issued a corrected invoice to PDI for \$2,069.45 (Tr. 172, 521-22; CX 36, p. 13) and another corrected invoice for \$2,055.51 (CX 33, p. 82).

L&P's records revealed a different account of sales which showed net proceeds of \$8,023.45 (Tr. 174-75; CX 36, pp. 65-66).

Jay Brokers' records contained copies of these two different accounts of sales (Tr. 177-79; CX 36, pp. 75-78). Another irregularity was that L&P's records contained an invoice from PDI to L&P billing L&P at \$8,805.26, which was \$781.81 more than the \$8,023.45 reflected on the account of sales (Tr. 176; CX 36, p. 67). L&P paid \$8,805.26 to PDI and PDI remitted \$2,055.51 to Sun World. PDI and Jay Brokers divided the difference on a 60-40 basis.

5. The Sun World Transaction (CX 38)

Sun World sold 3,040 cartons of grapefruit to PDI at the original contract price of \$15,814.70 on or about July 28, 1994 (CX 38, pp. 1-2). PDI resold the produce to L&P Fruit. The produce was inspected upon arrival at L&P Fruit (CX 38, pp. 5-6). An account of sales on L&P letterhead was submitted to Sun World by Jay Brokers reflecting net proceeds of \$1,588.35 (Tr. 215-16; CX 38, pp. 7-8). Based upon this account of sales, Sun World issued a corrected invoice for \$1,695.50 (CX 38, p. 17). Sun World received a check from PDI dated September 7, 1994, which included \$1,695.50 for the invoice in question (Tr. 216; CX 38, p. 18). A copy of an account of sales obtained from L&P's records differed from the account of sales submitted to Sun World by Jay Brokers. The account in L&P's records showed net proceeds of \$4,551.35 instead of the \$1,588.35 reported to Sun World (Tr. 217-19; CX 38, pp. 17-18, 35-36). Jay Brokers' records revealed copies of two different accounts of sales on L&P's letterhead for the same produce, one showing net proceeds of \$1,588.35 and the other showing net proceeds of \$4,551.35 (Tr. 220-21; CX 38, pp. 43-46). PDI's records showed that finally L&P was invoiced and paid \$5,367 but that Sun World was paid only \$1,695.50. The difference of \$3,671.50 was divided between Produce Distributors and Jay Brokers on a 60-40 basis (Tr. 224; CX 38, pp. 47, 48). A copy of a stub of a check issued by PDI to Jay Brokers on November 9, 1994, contains an amount which exactly matches the 40% allocated to Jay Brokers by PDI for this transaction (CX 38, p. 54).

6. The Pacific International Marketing Transaction (CX 41)

This transaction involves the sale of 1,716 cartons of grapes by Pacific International Marketing to PDI at the original contract price of \$25,959.30. The produce was sold to BT Produce. The produce was inspected on July 7, 1994, and reinspected on July 8, 1994. The second inspection

report submitted to Pacific International showed a total of 29% average defects including 8% serious damage of which 3% represented decay (CX 41, p. 12). A copy of the July 8, 1994, inspection report was not found in BT Produce's records. A slightly different version of the July 8, 1994, inspection report was found in Jay Brokers' records. That showed 27% average defects including 6% serious damage of which only 1% was for decay (CX 41, p. 38). A copy of the inspection report obtained from USDA Inspector Service indicated that the inspection report submitted to Pacific International had been altered in three places (Tr. 183-86; CX 41, p. 47). BT Produce's records contained a copy of a July 7, 1994, inspection report but not the July 8, 1994, inspection report that had been altered (CX 41, p. 33).

PDI's jacket file shows that BT Produce paid \$13,932.50 to PDI for the produce but PDI remitted only \$13,003.50 to Pacific International and allocated the difference of \$929 on a 60-40 basis - \$557.40 to PDI and \$371.60 to Jay Brokers (Tr. 198; CX 41, p. 40).

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The prototype transactions and the other 35 transactions provide overwhelming evidence that Respondents Irene Russo, doing business as Jay Brokers, and PDI made false and misleading statements for a fraudulent purpose and that they failed to truly and accurately account to consignors for the net proceeds resulting from the sale of their produce on a consignment basis.

Ms. Rucker's undisputed testimony was that the usual and customary fee paid by consignors to a "middle man" is twenty-five cents per carton (Tr. 132). However, after deducting such usual and customary fees, Respondents received approximately \$43,000 in "profits" as a result of their misrepresentations to their consignors.

Respondents' actions clearly violate section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The representatives of the five shippers who testified confirmed that they had absolutely no knowledge that the actual net proceeds were not accurately reported to them and that they relied upon PDI's representations in agreeing to accept less money than was actually received by PDI. All of these representatives felt that PDI had taken advantage of their firms in the fraudulent transactions and that their growers had been deprived of money that rightfully belonged to them.

While neither Joe Russo nor Irene Russo admit that they altered the accounts of sales or the inspection certificates, the majority of the altered documents were contained in Jay Broker's files; and Joe Russo and Irene Russo were actively involved in negotiating the transactions for PDI and in handling the paperwork. I conclude that Joe Russo and/or Irene Russo, as agents for PDI, intentionally altered the accounts of sales and inspection certificates.

Section 2(4) of the PACA requires that false and misleading statements be made for a "fraudulent purpose." The fraudulent purpose was to mislead Respondents' consignors to accept lesser amounts of money than were received.

Respondents knew or should have known that these fraudulent actions violated the PACA. PDI and Irene Russo have been active in the produce industry as PACA licensees for many years.

PDI is responsible for the acts of Joe Russo and Irene Russo. PDI hired Joe Russo as its agent and "employee" and allowed Joe Russo to use its company name and credit rating in connection with these transactions. PDI also received and retained substantial profits from the fraudulent transactions. PDI cannot escape liability by claiming that it never questioned the records submitted to it by the Russos. PDI had an obligation to ensure that its actions and transactions conformed with the requirements of the PACA.

These violations of section 2(4) are most serious because they involve breaches of fiduciary duty by an agent to its principal. Respondent PDI, as an agent, owed its consignors a high degree of care, honesty and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-6, 170 (1987); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732 (1978).

Respondents' actions were wilful, repeated, and flagrant. "Wilfulness" is defined as "if an act is done intentionally, irrespective of evil intent, or done with careless disregard to statutory requirements." *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629 (1996). Joe Russo and Irene Russo, as PDI's agents, intentionally altered accounts of sales and inspection certificates in violation of section 2(4) of the PACA and they also acted with careless disregard of the statute's requirements. Repeated violations are those occurring more than once. Respondents' actions violated the PACA in 41 separate transactions. *In re Atlantic Produce*, 35 Agric. Dec. 1631, 1640 (1976) *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978). Respondents' violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred. *Veg Mix, Inc.*, 48 Agric. Dec. 595 (1989); *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-74 (5th Cir. 1980) (Per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-269 (1973).

II. The Joint Venture

There is no question in my mind that Irene Russo participated in a joint venture with PDI in connection with the fraudulent transactions at issue.

Irene Russo actively participated in the transactions and Jay Brokers received 40% of PDI's fraudulent gains after PDI deducted its expenses of listing Joe Russo as a PDI employee.

Many of the transaction files contained copies of notes written by Irene Russo to the participants, often asking suppliers to accept less money for their produce based upon falsified documents (e.g., CX 16, p. 7; CX 18, p. 7; CX 24, p. 20; CX 26, p. 17; CX 29, p. 5; CX 35, p. 3; CX 43, p. 5; CX 45, p. 4; and CX 48, p. 6).

At the bottom of PDI's file jackets for the relevant transactions are the letters "J/V" which stand for "joint venture." Adjacent to the letters "J/V" are written: "Jay B" which stands for "Jay Brokers" and "Produce" which stands for PDI. Adjacent to "Jay B" is an amount equal to 40% of PDI's profit in the transaction and adjacent to "Produce" is an amount equal to 60% of the profit (e.g., CX 16, p. 46; CX 28, p. 28; CX 33, p. 39; CX 43, p. 24; CX 55, p. 44).

Other relevant documentary evidence included a balance sheet for PDI as of December 31, 1993, and December 31, 1994. The balance sheet was reconstructed by Ms. Rucker who examined it but was not permitted to photocopy it. Ms. Rucker testified that the balance sheet listed payables in connection with a joint venture to either "JB" or "Jay Brokers" (CX 7; Tr. 70-73). PDI's aged payables ledger as of May 24, 1995, also lists payables to "JB" or "Jay Brokers." (CX 10, pp. 3-4; Tr. 87). Additionally, PDI's check register and canceled checks show payments by PDI to Jay Brokers in amounts corresponding to Jay Brokers' share of the joint venture profits in various transactions at issue (CX 15, 59; Tr. 95-98).

Several representatives of firms involved in the transactions testified. Some testified that they believed that Irene Russo was actively involved in the transactions; others testified that they did not have that impression. Thus, Susan Neill Lucas, president of Susan Neill Fresh Fruit Company, testified that she received faxed messages signed "Irene" originating from Jay Brokers (Tr. 387, 410; CX 18, p. 7). Teresa Llorente, a sales associate for John Simon Produce Company, also testified

about significant dealings with Irene Russo (CX 33, p. 33; Tr. 496). Lee Isaac, a fruit broker for Isaac Brothers, testified that he dealt with Joe Russo at times and with Irene Russo at other times and he believed that Irene Russo worked for PDI (Tr. 639-40).

However, Bernadine Andrade, a product manager for Sun World International, stated that her conversations with Irene Russo about the transactions of her firm were not significant (Tr. 517). Similarly, Corky Meyers, Frank Porcaro, and John Kohl, other industry representatives, testified that they were not aware of any such joint venture (Tr. 609-11, 754-55, 870).

I do not accord much weight to the impressions of these representatives because their testimonies are conflicting and these individuals would not necessarily know whether or not PDI and Irene Russo were involved in the joint venture.

I attach more weight to the abundance of documents in the transaction files signed by Irene Russo, to PDI's records that show the joint venture, and to the testimony of several employees and representatives of PDI who were in a position to know about the joint venture. These individuals believed that there was such a joint venture.

Carol Dowe, PDI's billing clerk, testified that she believed that there was such a joint venture and that PDI's bookkeeper, Karyn Hertzberg, told her to record this in PDI's books and records. Ms. Dowe testified that in PDI's records, "J/V" meant "joint venture" and "JB" meant "Jay Brokers." She also testified about conversations that she had with Irene Russo regarding the transactions (Tr. 974, 976, 978-82, 984, 996).

Ms. Rucker testified that Karyn Hertzberg, PDI's office manager, also described the transactions as being joint venture transactions (Tr. 41). Ms. Hertzberg told Ms. Rucker that "J/V" in PDI's books stood for "joint venture" (Tr. 117). Ms. Hertzberg also told Ms. Rucker that PDI

maintained a ledger which recorded the balance owed to Jay Brokers for their share of the profits in the transactions (Tr. 51). Ms. Hertzberg also confirmed to Ms. Rucker that Joe Russo's gross salary and PDI's expenses of listing him as an employee were deducted from the 40% that was paid to Jay Brokers (Tr. 51). Although this testimony is hearsay, hearsay testimony is admissible in these proceedings and I accord significant weight to this testimony because Respondents could have called Ms. Hertzberg to contradict this testimony but did not do so.

Thomas Gangemi III, the son of PDI's president who had worked as a salesman for PDI, testified that, based upon his conversations with his father and based upon PDI's paperwork, he also concluded that PDI was involved in a joint venture with Jay Brokers (Tr. 1034). He stated:

Answer

It all came the day they came in the office and it was explained this is Joey and Irene Russo; they're going to be working for us on a joint venture deal. That was it.

Question

Well, who explained that to you.

Answer

My father.

Question

And was Irene present when this. . .

Answer

Yes, they were both present.

(Tr. 1045)

Mr. Gangemi further testified regarding Irene and Joe Russo:

They're, you know, a team. It was -- it always was a team to me, the Russos. It was never, you know, one or the other. It was just the Russos.

(Tr. 1046)

Paul Martucci, PDI's certified public accountant, also testified that PDI's employees told him that PDI and Jay Brokers were involved in such a joint venture (Tr. 947-50). He understood that there was no difference between Irene Russo and Joe Russo in connection with the work performed for PDI (Tr. 962-63). He confirmed that in PDI's records any expenses to PDI that resulted from listing Joe Russo as a PDI employee were offset against payments made by PDI to Jay Brokers (Tr. 959-61).

The final two witnesses were PDI's president, Thomas Gangemi, Jr., and Irene Russo. Their testimonies are important.

Mr. Gangemi testified that he was involved in a joint venture with Joe Russo and not with Irene Russo with regard to the transactions at issue; that Joe Russo requested that Joe be listed on PDI's books as an employee; and that Joe Russo requested that his 40% share of the profits to be paid to Jay Brokers after PDI deducted Joe Russo's gross salary and PDI's employee-related expenses (2 Tr. 6, 7, 33). Mr. Gangemi stated that if Ms. Rucker understood him to say otherwise, "it was inaccurate" (2 Tr. 6, 14). When asked why his employees assumed that there was such a joint venture, Mr. Gangemi stated:

That could have been supported by the constant messages they received signed "Irene" and the communications, telephone communications, you know. They could have assumed that.

(2 Tr. 16)

Irene Russo's testimony was frequently incredible. She stated that she wrote and signed the many notes contained in the transaction files, "because my husband has the most horrible handwriting in the world and nobody could read it" (Tr. 804). When questioned why Ms. Dowe claimed that, on numerous occasions, Irene was the one speaking to Ms. Dowe and not Joe,

Ms. Russo said that she was doing this to help her husband (Tr. 1055). I find unbelievable that Ms. Russo, who testified that she had a produce business of her own, would be so deeply involved in consistently renegotiating the transactions at issue merely to help her husband because he had poor handwriting.

When asked if Joe ever mentioned the 60-40 split to her, Ms. Russo again answered in a manner that strained credibility. She answered:

He said he had - he was working for Buddy [Thomas Gangemi, Jr.] and that him and Buddy were, you know, they set up a deal and this is -- you know, this is what it was.

(Tr. 1060)

Ms. Russo's explanation of why Jay Brokers was receiving amounts of money "coincidentally" equal to 40% of the profits in the transactions in question, after Mr. Russo's salary and salary expenses were deducted, was even more incredible. She explained that these payments by PDI to Jay Brokers were to cover office expenses incurred by Joe for sharing her home office such as the use of the telephone and fax machine (Tr. 1065-67). However, she stated that there was no agreement as to how much would be paid for these expenses and she had no idea how any such amount was to be determined (Tr. 1064-65). Furthermore, she did not know whether she was to submit any documentation to anyone for any such expenses (Tr. 1064).

When Ms. Russo was asked to explain a check that Jay Brokers received from PDI for \$8,200, she could not explain what use of telephones, fax machine, or office expenses this covered. She answered:

Well, I know I was complaining about the phone bill and, you know, I had heat, I had the - and I told him, I said it's not enough. I told my husband it's not enough money to compensate for all this use of phones and the fax machine. And I said we need a

little extra. So I know he spoke to Buddy. And he said, please, you know, help us out, we need a little extra into the - to be paid. And Buddy was always there.

(Tr. 1067-68)

When asked how much her telephone bills increased as a result of their use for the PDI work,

Ms. Russo again did not make sense. Her answer:

They increased on a large - maybe \$500 to \$600 higher than - maybe up to \$1,000 sometimes. Joe was constantly on the phone. I mean, he would be calling long distance, hang up and redial the number again and hit the wrong number and redial it again.

(Tr. 1103)

When asked why the checks were sent erratically rather than being paid as bills were incurred, Ms. Russo answered:

Well, like I said, you know, I told Joe if the funds were running low, we need to be reimbursed back up on these expenses. So. . .

(Tr. 1103)

The weight of the evidence overwhelmingly supports the conclusion that Irene Russo, doing business as Jay Brokers, was involved in a joint venture with PDI with regard to the transactions at issue. Ms. Russo actively participated in the transactions and she received a share of the profits from the transactions. The exhibits show Ms. Russo's active participation and correlate the payments to Jay Brokers' share of the profits in the transactions at issue. Key PDI employees - Ms. Dowe and Ms. Hertzberg; PDI's certified public accountant, Mr. Martucci; and Thomas Gangemi, Jr., the son of PDI's president, all concluded that there was such a joint venture. PDI's records labelled the transactions as a joint venture between PDI and Jay Brokers. The testimony of Thomas Gangemi, Jr., is not inconsistent with the existence of such a joint venture. He testified that he had

such a joint venture agreement with Joe Russo and that Joe Russo requested that payment be made to Irene's company. As I have previously stated, Ms. Russo's explanation that the payments to Jay Brokers are not payments of Jay Brokers share of the profits but are reimbursement for office expenses is preposterous. The large amounts of the payments would seem absurdly high as a reimbursement for telephone bills. Furthermore, Ms. Russo was unable to quantify such expenses, there was no agreement regarding such expenses and there were no bills or documentation for such expenses. Thus, in view of the active involvement of Irene Russo in the transactions in question and the compensation which she received, I conclude that there was a joint venture between Respondents as alleged.

III. The Issue of Expanding the Investigation

Section 6(c) of the PACA (7 U.S.C. § 499f(c) reads in applicable part:

(c)(1). Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this Act are indicated other than the alleged violations specified in the complaint or notification that served as a basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(c)(3). Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section, or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request

of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

The investigation in this matter was initiated in May 1995. PDI was notified of the investigation on May 24, 1995 (Tr. 292). In June 1995, Complainant expanded the time period of the investigation from an eight-month time period to a two-year time period and also expanded the investigation to include Jay Brokers (Tr. 46, 322). The investigation was also expanded in March 1996 and in April 1997 (Tr. 287-89). When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify PDI or Irene Russo in writing of the expansion of the investigation.

Respondent Russo contends that because Complainant failed to notify Respondents in writing that the investigation had been expanded, Complainant failed to comply with section 6(c)(3) of the PACA and, therefore, the Complaint must be dismissed. Respondent Russo also cites H.R. No. 104-207, found in 1995 USCAN, p. 453 dated July 26, 1995, which includes a letter of Secretary of Agriculture Dan Glickman.

The language in section 6(c) of the PACA became effective in November 1995. The legislative history is not helpful in clarifying the language. The Senate issued no report. The House Report merely sets forth the language which was subsequently enacted.

However, in accordance with the Judicial Officer's decision in *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), I find that, since the beginning of this investigation preceded the enactment of the amendment, the requirement for written notification of the expansion of the investigation does not apply here.

IV. Miscellaneous Comments

Respondent Irene Russo argues in her Reply Brief that New York State partnership law should be applied with respect to the joint venture. However, Complainant alleges that a joint venture was involved and not a partnership. Therefore, the definitions in the New York State partnership law are inapplicable.

I also disagree with Respondent's arguments in its Reply Brief that there cannot be a joint venture without "holding out to third parties." Respondent cites no authority for this proposition and I have found no such authority. A joint venture can be entered into and effectuated without publicizing it; there is no requirement that it be publicized.

Complainant does not need to prove that the altered produce records were actually done by Irene Russo herself. The evidence leads to the conclusion that the documents were altered at the Russo home office on behalf of PDI; and Irene Russo was involved in the joint venture with PDI with regard to the transactions at issue.

Respondent Russo also argues that Irene Russo had no motive to falsify certificates of inspection. Her motive is one of the strongest in the world - financial gain.

Respondent Russo argues that a negative inference must be drawn against Complainant because it failed to call PDI's bookkeeper or office manager, Karyn Hertzberg, as a witness to corroborate statements that Ms. Rucker testified that Ms. Hertzberg made. However, Respondent Russo also failed to call Ms. Hertzberg to contradict such statements. I also found it interesting that neither party called as a witness Joe Russo, an individual who was so deeply involved in these transactions.

Additionally, Ms. Rucker did not recant her testimony that PDI was involved in a joint venture with Jay Brokers, as Respondent Irene Russo alleges in its brief. Furthermore, I found Ms. Rucker to be an extremely credible witness.

V. The Appropriate Sanction

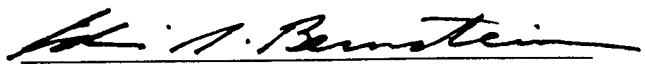
I agree with Complainant that given the serious breaches of fiduciary relationships here, the alteration of numerous documents, the wilfulness, and the repeated and flagrant nature of the violations, that the only appropriate sanction is revocation of the PACA licenses of both Respondents, Produce Distributors, Inc. and Irene Russo, doing business as Jay Brokers. The imposition of a monetary fine as a civil penalty would be wholly inadequate. Nothing short of revocation of both Respondents' licenses would serve to protect the public and to serve notice upon others in the produce industry that such conduct is intolerable and will not be countenanced.

Order

Respondents Produce Distributors, Inc., and Irene Russo, doing business as Jay Brokers, have committed wilful, repeated, and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) and Respondents' PACA licenses are revoked.

This Decision will become final without further proceedings 35 days after service upon Respondents unless appealed to the Secretary by a party to the proceeding within 30 days after its service upon that party in accordance with section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

October 21, 1998


EDWIN S. BERNSTEIN
Administrative Law Judge